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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D., HARRY M. COVELL, M.D., and WARREN G. SUNDAY,

Petitioners,

vs.

LINDA KAY SPARKMAN and LEO SPARKMAN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Harold D. Stump, John H. Hines, Harry M. Covell and Warren G. Sunday, Petitioners, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit in the entitled case rendered on March 23, 1977.

OPINIONS BELOW.

To Plaintiffs' Complaint, Defendants, Warren G. Sunday, Harold D. Stump, John H. Hines, M.D., John C. Harvey, M.D., Harry M. Covell, M.D., and DeKalb Memorial Hospital, Inc. filed, among other responsive pleadings, Motions to Dismiss.

In his Memorandum of Decision and Order filed May 15, 1976, the United States District Court for the Northern District of Indiana, Fort Wayne, Division, Jesse E. Eschbach, Judge, granted said motions stating that Defendant, Harold D. Stump, acting as a Circuit Court Judge in a State Court, was clothed with absolute judicial immunity and that Plaintiffs had no constitutional claims which could be asserted against the remaining Defendants. The District Court's Memorandum of Decision and Order appears as *Sparkman* v. *McFarlin*, Civil No. F 75-129 (D. Ind., decided May 13, 1976).

An Appeal from the District Court's Order was taken by Plaintiffs to the United States Court of Appeals for the Seventh Circuit which Court, by Opinion rendered March 23, 1977 reversed the Judgment of the District Court and remanded the cause for further proceedings consistent with its Opinion. The Opinion of the United States Court of Appeals for the Seventh Circuit appears as *Sparkman* v. *McFarlin*, Civil No. 76-1706 (7th Cir., decided March 23, 1977).

The Memorandum of Decision and Order of the District Court Judge and the Opinion of the United States Court of Appeals for the Seventh Circuit are reprinted in the Appendix hereto.

JURISDICTION.

This is a controversy founded upon Plaintiffs' assertion of causes of action arising under the First, Fourth, Fifth, Eighth, Nineth and Fourteenth Amendments to the Constitution of the United States and under 42 U. S. C. §§ 1983 and 1985(3), with jurisdiction laid under 28 U. S. C. §§ 1331 and 1343. Plaintiffs sought declaratory relief pursuant to 28 U. S. C. §§ 2202-2203.

This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the duly elected Judge of the Circuit Court of DeKalb County, Indiana, a Court of original, exclusive jurisdiction in all cases at law and equity whatsoever, had jurisdiction to consider and approve a Petition presented by Ora E. McFarlin, the natural mother and custodian of Linda Kay Sparkman, to have tubal ligation performed on said Linda Kay Sparkman, and whether said act of approval is clothed with judicial immunity from liability under the federal civil rights statutes.

No other questions were presented on appeal to the United States Court of Appeals for the Seventh Circuit.

CONSTITUTION, FEDERAL AND STATE STATUTES.

United States Constitution, Amendment XIV, Section 1 provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U. S. C. § 1985(3) provides:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person of privileges and immunities under

the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the law; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

I. C. 1971, § 16-8-3-1 provides in part:

"Medical or surgical treatment of incompetent—Consent. —Consent to medical or surgical treatment of a person (herein called the 'patient') incompetent to give such consent by reason of minority, insanity, mental illness, imbecility, idiocy, senilty, habitual drunkenness or drug addiction may be given by the following persons, and such consent shall, on and after July 6, 1961, be binding on the patient, his or her heirs, administrators, executors and personal representatives:

(a) If the patient is an unmarried unemancipated minor, by one (1) parent having custody of such minor, Provided, That if there is no such parent, by the legal guardian of the minor, and further Provided That if the patient is a neglected child, by the agency of which the child has been made a ward of the juvenile court; . . ."

I. C. 1971, § 16-8-4-2 provides:

"Consent of parent to medical treatment of child.—Any person who is the parent of a child shall be competent to

given consent to and contract for medical or hospital care or treatment of such child including surgery."

I. C. 1971, § 33-4-4-3 provides:

"Jurisdiction.—Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon justices of the peace. It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships: Provided, however, That in counties in which criminal or superior courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."

STATEMENT OF THE CASE.

When Plaintiff, Linda Kay Sparkman, was fifteen (15) years old, her mother, Ora E. McFarlin, determined that it would be advisable to have Linda undergo a tubal ligation. The ostensible grounds for this decision were that, according to her mother, "Linda was somewhat retarded", that without her mother's consent or knowledge, Linda had allegedly taken up dating and staying overnight with older youths and men, and that her mother was unable to maintain continuous control and observation over Linda to "prevent unfortunate circumstances". Consequently, her mother sought the services of an attorney, Warren G. Sunday, who prepared a certain "Petition to Have Tubal Litgation Peformed on Minor and Indemnity Agreement." By this document, Mrs. McFarlin consented to the performance of the operation, and agreed to indemnify and hold harmless the attending surgeon and the hospital from any liability growing out of the operation. This Petition was thereafter presented to

Defendant, Harold D. Stump, Judge of the Circuit Court of DeKalb County, Indiana, who "approved" the ex parte application. Thereafter on July 16, 1971, the three Defendant doctors performed the ligation at the Defendant hospital.

In ruling on the Motions to Dismiss filed by all Defendants except Defendant, Ora E. McFarlin, the United States District Court for the Northern District of Indiana, Fort Wayne Division, held, with respect to the question here presented, that the only State action involved was that of Judge Harold D. Stump as Judge of the DeKalb Circuit Court, Indiana, "approving" Defendant, Ora E. McFarlin's Petition and held further that since the Circuit Courts of Indiana are Courts of general jurisdiction having "original, exclusive jurisdiction in all cases at law and in equity whatsoever", Judge Harold D. Stump had jurisdiction in his Court to consider Petition for Tubal Ligation; and although said "approval" may in retrospect have appeared to have been premised on an erroneous view of the law, the fact that subject matter jurisdiction resided in Judge Harold D. Stump clothed the act with absolute judicial immunity from liability under 42 U. S. C. §§ 1983 and 1985(3) or under the Fourteenth Amendment. The District Court founded its holding upon the settled and established precedent laid down in *Bradley* v. *Fisher*, 80 U. S. (13 Wall.) 646 (1871) and *Pierson* v. *Ray*, 386 U. S. 547 (1967) both of which cases hold that except where there is a "clear absence of all jurisdiction over the subject matter", a Judge is entitled to complete immunity to suit based upon his official acts.

The United States Court of Appeals for the Seventh Circuit, by Opinion dated March 23, 1977, reversed. The Opinion of Judge Swygert, although paying lip services to the unequivocal holdings of *Bradley* v. *Fisher, supra,* and *Pierson* v. *Ray, supra, ex post facto* changed the law and held that the words "clear absence of all jurisdiction over the subject matter" should not be given their clear and obvious meaning. Taking the position that the statute conferring general jurisdiction upon the Circuit Court

(I. C. 33-4-4-3) which states: ". . . and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer" is meaningless, the Court of Appeals without citing any authorties therefor, held, as a matter of law, that "a claim must be characterized as a case in law or in equity in order to come within the statute".

In essence, the Court held that neither Judge Harold D. Stump nor any other Circuit Court Judge has a right to reply upon the Indiana statutes conferring jurisdiction upon Circuit Courts in the State nor upon the clear language of *Bradley* v. *Fisher, supra,* and *Pierson* v. *Ray, supra.*

REASONS FOR GRANTING WRIT OF CERTIORARI.

I.

This Petition should be granted by this Court because the decision of the United States Court of Appeals for the Seventh Circuit conflicts with and represents and unwarranted departure from the applicable decisions of this Court concerning judicial immunity.

Petitioner submits that this Court should review this case because the Court below ignored the body of law developed by this Court in *Bradley* v. *Fisher, supra,* and *Pierson* v. *Ray, supra,* which enunciate doctrines establishing judicial immunity. Those cases, and cases hereinafter set forth, hold that unless the act of a Judge of a court of general jurisdiction has been proscribed, that is, his jurisdiction to act limited by statute or by judicial fiat, the act of a Judge, sitting in his judicial capacity, is clothed with judicial immunity.

On July 9, 1971, there was no specific judicial or statutory proscription in the State of Indiana against a parent consenting to surgery on a minor child involving tubal ligation. Such proscription did not occur until 1975 when the Appellate Court of

Indiana in the case of *A. L.* v. *G. R. H.*, 46 Ind. Dec. 452, 325 N. E. 2d 501 (1975) first announced:

> "We believe that common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom." *A. L.* v. *G. R. H., supra,* at 502.

Likewise, in the year 1971, in addition to Indiana Code 33-4-4-3 which invests Circuit Courts in the State of Indiana with general jurisdiction there was in full force and effect in the State of Indiana the following statutes:

> "I.C. 16-8-3-1 *Medical or Surgical Treatment of Incompetent—Consent.* Consent to medical or surgical treatment of a person (herein called the 'patient') incompetent to give such consent by reason of minority, insanity, mental illness, imbecility, idiocy, senility, habitual drunkenness or drug addiction may be given by the following persons and such consent shall on and after July 6, 1961, be binding on the patient, his or her heirs, administrators, executors and personal representatives:
>
> (a) If the patient is an unmarried, unemancipated minor, by one (1) parent having custody of such minor, provided, that if there is no such parent, by the legal guardian of the minor, and further provided that if the patient is a neglected child, by the agency of which the child has been made a ward of the Juvenile Court; . . ."
>
> and
>
> "I.C. 16-8-4-2 *Consent of Parent to Medical Treatment of Child.* Any person who is a parent of a child shall be competent to give consent to and contract for medical or hospital care or treatment of such child including surgery."

The Federal District Court, in its Memorandum of Decision and Order makes reference to the fact that Mrs. Ora E. McFarlin, by filing her Petition to Have Tubal Ligation performed, consented to the performance of the operation. The fact of said consent serves to make the distinction between the Court's "approval" referred to erroneously by the United States

Court of Appeals for the Seventh Circuit as the Court's "order" significant. Again, prior to the decision of *A. L.* v. *G. R. H., supra,* no judicial determination had been made in the State of Indiana construing or delimiting what surgery might be consented to by the parent or approved by a Circuit Court Judge.

The existence of the aforementioned statutes, the contents of which were presumably known by the Judge in July 1971, conferring general jurisdiction over all causes, matters and proceedings and conferring the right to consent of a parent on behalf of a minor child to perform surgery, cannot be ignored. Judge Swygert was in error when he stated in his opinion:

> "Moreover, counsel has not, during the course of this litigation cited any specific statutory or common law basis upon which a Court can order the sterilization of a child simply upon the petition of a parent."

I. C. 16-8-3-1 was specifically set forth in the Answer Brief of Defendant Appellees, John C. Harvey, M.D. and DeKalb Memorial Hospital, Inc., as a plausible basis of jurisdiction of Defendant, Harold D. Stump, to approve the petition.

The fact that the record before the Circuit Court of Appeals did not contain a finding by the Circuit Court Judge of the specific basis upon which he acquired jurisdiction cannot be used as a basis for concluding the Court had no jurisdiction to act. Long established precedent in the State of Indiana evidenced by two cases, to-wit: *Baltimore & Ohio Railway Company* v. *Freeze,* 169 Ind. 370, 82 N. E. 761 (1906), and *Waugh* v. *Board of Commissioners of Montgomery County,* 64 Ind. App. 123, 115 N. E. 356 (1917), established the rule that if the Judge has jurisdiction over the subject matter, he has jurisdiction to determine whether he has jurisdiction over the parties. In *Baltimore & Ohio Railway Company* v. *Freeze, supra,* the Court said:

> "Every court possesses the power of determining its own jurisdiction, both as to the parties and the subject matter of the action. It is well settled that, when an inferior tribunal

is required to ascertain and decide upon facts essential to its jurisdiction, its judgment thereon is conclusive against collateral attack, unless the want of jurisdiction is apparent on the face of the proceedings. A decision on a jurisdictional question, either expressly or impliedly given by a tribunal, has the same binding effect upon the parties as a decision on any other matter within its cognizance in any pending case or proceedings, and an error in this respect must be corrected in the same manner as other errors are authorized to be corrected. . . ."

Waugh v. *Board of Commissioners of Montgomery County, supra* held:

> "Every court is clothed with authority to determine its own jurisdiction, both of parties and of subject matter and when it appears of record from a court of inferior jurisdiction such as the Board of Commissioners, that the jurisdiction of such tribunal was invoked in a given matter and that it was required to decide on facts essential to such jurisdiction, its judgment thereon is conclusive against collateral attack unless want of jurisdiction is apparent on the face of such record. . . ." *Waugh*, at 360.

This long standing unimpeachable rule was ignored by the Circuit Court of Appeals.

In 1971, there was statutory basis conferring jurisdiction upon Defendant, Harold D. Stump, to entertain Defendant McFarlin's Petition. That fact is supported, a fortiori, by the fact that in *A. L.* v. *G. R. H., supra*, a Circuit Court Judge in Indiana conducted a trial on a complaint for declaratory judgment alleging no existing Indiana precedent, seeking declaration of a parent's right under the common law attributes of the parent-child relationship to have her son sterilized.

The Court of Appeals further ignored the requirements laid down by *Bradley* v. *Fisher, supra*, and *Pierson* v. *Ray, supra*, in that the fact of absence of all jurisdiction must be known to the Judge. Nothing in the record presented to the Circuit Court of Appeals permitted Judge Swygert to reach the conclusion that

Judge Harold D. Stump knew that he had no jurisdiction to consider McFarlin's Petition nor to act thereon. The record including the Memorandum of Decision and Order of the United States District Court does not suggest such nor permit that inference.

Bradley v. *Fisher, supra*, remains the undisturbed authority with respect to the doctrine of judicial immunity. It provides:

> ". . . that Judges of Courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when some acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority and for the exercise of such authority *when the want of jurisdiction is known to the Judge*, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the Judge or in the Court with keyholes, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case although upon the correctness of his determination in these particulars the validity of his judgment may depend. . . ." *Bradley* v. *Fisher*, at 651 (emphasis added).

In *Johnson* v. *MacCoy*, 278 F. 2d 37, 38 (9th Cir. 1960), the Court reiterated the rule:

> "The well recognized exception to such general immunity of a judicial officer is defined in the same case (*Bradley* v. *Fisher, supra*)—raising the distinction between an act done in excess of jurisdiction, and an act done in clear absence of all jurisdiction *and known to the Judge to be such.*" *Ryan* v. *Scoggin*, 245 F. 2d 54 (10th Cir. 1957). (emphasis added)

Of equal import to the reiteration of the rule requiring knowledge enunciated by *Johnson* v. *MacCoy, supra*, is the following statement:

> "Nor do we think that because one Judge believes a warrant should issue and that he has jurisdiction to issue it and a second Judge of the same Court believes that the first Judge has no such jurisdiction is of any material consequence. *Each Court has jurisdiction to determine its own jurisdiction*. . . ." *Johnson* v. *MacCoy*, at 40 (emphasis added).

The approval appended to Ora E. McFarlin's sworn petition shows on its face that it was approved by Harold D. Stump solely in his role as Judge of the DeKalb Circuit Court. It cannot be seriously contended that the Petition was presented to him in any other capacity. The act of approval was a judicial act.

In the year 1971, there was no proscription, by statute or judicial fiat, against his approval of the Petition.

The statutory scheme to which Judge Swygert refers on page 5 of his Opinion did not, by its terms negate sterilization under any other circumstances. It did not, by its terms, proscribe sterilization of persons other than institutionalized persons.

Similarly, Judge Swygert's assertion on page 6 of his Opinion in construing the effect of *A. L.* v. *G. R. H., supra,* is mistaken. The effect of that case is not to remove *jurisdiction* from Circuit Courts concerning sterilization, but to remove that *authority* from the Court which would invest parents with the power to sterilize their children. From and after April 10, 1975, all Circuit Court Judges in the State of Indiana, including Judge Harold D. Stump, were aware of the fact that the decision in *A. L.* v. *G. R. H., supra,* deprived them of *authority* to permit parents the power to sterilize their children, but most certainly said Courts were not deprived of *jurisdiction* to consider and act upon petitions requesting such authority.

The statement by Judge Swygert on page 6 of his Opinion, to-wit:

> "There are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take."

is characteristic of the tenor of the Opinion itself. It ignores all of the clearly enunciated fundamentals of judicial immunity laid down by *Bradley* v. *Fisher, supra,* and reinforced by *Pierson* v. *Ray, supra,* and cites no authority in support. The example set forth in the footnote is absurd.

Finally, the Court's remark on page 8 of his Opinion that ". . . the Petition and Order were never filed in Court", suggests that "filing in Court" in an apparently formal way is an absolute antecedent requirement to a Circuit Court in Indiana having jurisdiction over the subject matter of the Petition. This statement is likewise unsupported by any authority.

The rule is and should be that unless Judge Harold D. Stump's act in approving Ora E. McFarlin's Petition was, in 1971, specifically proscribed, said judicial act must be clothed with immunity from liability. That Defendant Harold D. Stump acted in excess of his jurisdiction is now realizable. To hold that he acted in the clear absence of all jurisdiction and with knowledge of that fact is without basis in law or fact.

II.

This Petition should be granted because this case represents an issue of national importance which will affect the scope of exposure to personal liability of every trial court judge in our country.

The doctrine of judicial immunity exists not solely for the benefit and protection of a judge whose act within his judicial role may arouse the most intense feelings of the litigants, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences so as not to be intimidated. See *Pierson* v. *Ray, supra.*

This Court by its decisions has recognized the doctrine of judicial immunity in all cases except those in which there is a "clear absence of all jurisdiction over the subject matter" and

"when that want of jurisdiction is known to the judge". *Bradley* v. *Fisher, supra.*

The decision of the United States Court of Appeals for the Seventh Circuit, if allowed to stand, would render meaningless the standards for judicial immunity as established by this Court in *Bradley* v. *Fisher, supra,* and *Pierson* v. *Ray, supra.* The lower court would in their place substitute a standard which would require a court of general jurisdiction to act only pursuant to some specific and affirmative legislative or judicial grant of authority before jurisdiction could be found. This difference, although subtle, is significant. The practical result of the lower court's decision would be that a judge presiding over a court of general statutory jurisdiction, with jurisdiction to decide "all cases at law or equity whatsoever" and "all other causes, matters and proceedings where exclusive jurisdiction is not conferred by law upon some other court" would not be able to rely upon this broad grant of jurisdiction to act upon matters brought before it without fear of personal liability.

The fact that a judicial act performed under such grant of jurisdiction had not been proscribed by statutory or judicial fiat would be no guarantee that jurisdiction would subsequently be found to have existed. Rather, the court below would require that judges under such circumstances proceed at their own risk unless in addition to the grant of general jurisdiction some specific and affirmative legislative or judicial indication of authority may be found. Presumably, where the authorities were silent as to the court's jurisdiction, no jurisdiction would exist. Such reasoning is the sort of judicial sophistry which is employed when a given Judge wishes to reach a desired conclusion and does so, ignoring the principles of judicial precedent and carelessly creating the unsettling and chilling effect which the decision, if allowed to stand, will have upon the judiciary of the nation. Such decision would undermine the important public considerations which are the very basis for the recognition of judicial immunity. This Court is therefore called upon to reaffirm

once again those standards for judicial immunity which have been enunciated in its prior decisions and cited herein.

CONCLUSION.

It is of the utmost importance to the Judicial System functioning in the State and Federal Courts of the United States that Circuit Court Judges retain the protection of the doctrine of judicial immunity as set forth in *Bradley* v. *Fisher, supra,* and *Pierson* v. *Ray, supra.* The Opinion of the Circuit Court of Appeals, in refusing to grant Judge Harold D. Stump the immunity provided under said doctrine as enunciated, erodes the clarity of the doctrine to such an extent that resolution by the United States Supreme Court is required.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Indiana
Fort Wayne Division

LINDA KAY SPARKMAN, ET AL., *Plaintiffs,*
vs.
ORA E. MCFARLIN, ET AL., *Defendants.*
} Civil No. F 75-129.

MEMORANDUM OF DECISION AND ORDER.

This cause is now before the court on various Rule 12(b) motions[1] seeking dismissal for want of jurisdiction and for failure to state a claim upon which relief can be granted. For reasons given below, the motions will be granted for the reason that the actions complained of violate no federal constitutional guarantees.

The allegations of plaintiffs' complaint may be summarized as follows: when plaintiff Linda Kay Sparkman was 15, in 1971, her mother decided that it would be advisable to have Linda undergo a tubal ligation. The ostensible grounds for

1. Motion by defendant Stump to dismiss, filed Dec. 18, 1975, on the grounds that no state action is involved, on the grounds of judicial immunity, and on the grounds that plaintiff Leo Sparkman is without standing; motion by defendants Hines, Covell and Sunday to dismiss, filed Jan. 13, 1976, on the grounds of no state action; and motion by defendants Harvey and DeKalb Memorial Hospital to dismiss, filed Feb. 17, 1976, on the grounds of no state action; insufficiency of the allegations as to unequal treatment, conspiracy, and intent to discriminate; statute of limitations; and want of jurisdiction.

this decision were that, according to her mother, Linda was "somewhat retarded," that without her mother's consent or knowledge Linda had allegedly taken up dating and staying overnight with older youths and men, and that her mother was unable to maintain continuous control and observation over Linda to "prevent unfortunate circumstances." Consequently, her mother (defendant Ora McFarlin) sought the services of an attorney, defendant Warren Sunday, who prepared a certain "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement." By this document, Mrs. McFarlin consented to the performance of the operation, and agreed to indemnify and hold harmless the attending surgeon and the hospital from any liability growing out of the operation. This petition was thereafter presented to the Hon. Harold Stump, Judge of the Circuit Court of DeKalb County, Indiana, defendant herein, who "approved" the ex parte application.

Linda was then taken to the DeKalb Memorial Hospital. She had recently been treated there by defendant John Hines, M.D., for an attack of appendicitis. Linda was told that her trip to the hospital was the purpose of surgically removing her appendix. Instead, the real purpose of placing Linda in the hospital was to have the tubal ligation performed. On July 16, 1971, Dr. Hines performed the ligation. Defendant John Harvey was the anaesthesiologist, and Dr. Harry Covell, defendant, assisted in the operation.

From that time until late in 1973, Linda was not told that she had been sterilized. During that time she married plaintiff Leo Sparkman. It appears that some of the defendants continued to deny that a sterilization had been performed after some had admitted it, and that Linda's inability to have children has caused a rift in her marriage. Plaintiffs assert that they were finally informed by Dr. Hines in May, 1975 that the tubal ligation had been performed.

Plaintiffs assert a cause of action arising under the First, Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to

the Constitution and under 42 U.S.C.A. §§ 1983 and 1985(3), with jurisdiction laid under 28 U.S.C.A. §§ 1331 and 1343. Declaratory relief is sought pursuant to 28 U.S.C.A. §§ 2202-03.

Whether laid under section 1331 or 1343(3), and whether asserted directly or via section 1983 and 1985, plaintiffs' grounds for recovery are asserted to rest on the violation of constitutional rights. Plaintiffs urge that defendants violated the following constitutional guarantees:

1. that the actions were "arbitrary and thus in violation of the due process clause of the Fourteenth Amendment;

2. that Linda was denied procedural safeguards required by the Fourteenth Amendment;

3. that the sterilization was permitted without the promulgation of standards;

4. that the sterilization was an invasion of privacy;

5. that the sterilization violated Linda's right to procreate;

6. that the sterilization was cruel and unusual punishment;

7. that the use of sterilization as punishment for her alleged retardation or lack of self-discipline violated various constitutional guarantees;

8. that the defendants failed to follow certain Indiana statutes, thus depriving Linda of due process of law; and

9. that defendants violated the equal protection clause, because of the differential treatment accorded Linda on account of her sex, marital status, and allegedly low mental capacity.

Linda also seeks to assert pendent state claims of assault and battery and medical malpractice against the relevant defendants. Plaintiff Leo Sparkman asserts a pendent state claim for loss of potential fatherhood.

Whether brought under 42 U.S.C.A.§§ 1983 or 1985, with jurisdiction laid under 28 U.S.C.A. §1343, or brought under the Fourteenth Amendment directly with jurisdiction under 28 U.S.C.A. § 1331, the existence of a cause of action in this case depends on whether the complaint shows that rights protected by the Fourteenth Amendment have been violated by any of the defendants. The first concern "should be whether a constitutional duty derived from the Fourteenth Amendment has been breached." Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 Ind. L.J. 5, 23 (1974), *quoted in Bonner* v. *Coughlin*, 517 F.2d 1311, 1318 n.21 (7th Cir. 1975) (per Stevens, J.). Stated another way, the threshold question under the Fourteenth Amendment is whether the duties imposed by that amendment run only against the state, or whether they run against private individuals as well: "[T]he distinction between the two kinds of state involvement that may be relevant in civil rights litigation—first, whether the defendant has acted under color of state law, and, second, whether plaintiff's federal right is merely assertable against the State—requires consideration of the state action issue in cases bottomed on an alleged violation of the Fourteenth Amendment." *Cohen* v. *Illinois Inst. of Technology*, 524 F.2d 818, 829 (7th Cir. 1975) (per Stevens, J.).

In appraising the claimed constitutional violations, the court holds that each reflects a right which is assertable only against state conduct. The Fourteenth Amendment does not protect against arbitrary decisions by private individuals; it does not impose procedural safeguards upon purely private decision-making processes; it does not require that purely private decision-making proceed from promulgated standards; it does not protect against invasions of one's privacy by purely private actions; it does not safeguard as against private acts a woman's right to procreate; it does not proscribe "punishment," whether cruel or unusual, brought about by purely private conduct; it does not prevent purely private action that "punishes" a person be-

cause of her mental condition; it does not impose a duty upon private individuals to obey the laws of the state; and it does not require that private individuals refrain from discrimination or unequal treatment of classes of persons. The rule may be otherwise when state action is involved; thus, at the threshold, plaintiffs must show that state action was in fact involved in a manner that contributed to her alleged injuries, else no claim is made out under the Fourteenth Amendment.[2]

It is therefore necessary to determine what conduct, if any, may be considered to be an act of the State of Indiana, upon which plaintiffs might found their claims of state action. The actions of the private attorney who advised Mrs. McFarlin and who prepared the legal papers for presentation to Judge Stump are not actions of the State of Indiana. *Cf. Skolnick* v. *Spolar*, 317 F.2d 857 (7th Cir. 1963), *cert. denied*, 375 U.S. 904 (1963); *Jones* v. *Jones*, 410 F.2d 365, 366 (7th Cir. 1969) and cases there cited, *cert. denied*, 396 U.S. 1013 (1970).

Nor may the acts of the private physicians and anaesthesiologists, or those of the hospital in which the operation was performed, be considered to be acts of the State of Indiana. *Cf. Byrne* v. *Kysar*, 347 F.2d 734, 736 (7th Cir. 1965), *cert. denied*, 383 U.S. 913 (1966).

The only state action involved was that of Judge Stump, as Judge of the DeKalb Circuit Court, Indiana, in "approving" Mrs. McFarlin's petition. Plaintiffs seek to hold the private defendants liable on a theory that they conspired with Judge Stump to bring about the allegedly unconstitutional acts. 42 U.S.C.A. §§ 1983, 1985. If, however, Judge Stump is immune from suit, and no other state action can be shown,[3] no action will lie.

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2. Plaintiffs' contention to the contrary, relying on certain language in Griffin v. Breckenridge, 403 U.S. 88 (1971), has been fully considered and rejected in *Cohen, supra.*

3. Plaintiffs appear to assert an additional ground for finding "state action" the application of Ind. Code § 16-8-3-1 (Burns 1973). This statute authorizes a legal guardian to give consent for surgery or medical treatment on behalf of an incompetent person or minor.

(Footnote continued on next page.)

See, e.g., Grow v. *Fisher*, 523 F.2d 875, 877 (7th Cir. 1975); *Hansen* v. *Ahlgrimm*, 520 F.2d 768, 770 (7th Cir. 1975); *Guedry* v. *Ford*, 431 F.2d 660, 664 (5th Cir. 1970).

Except where there is a "clear absence of all jurisdiction over the subject-matter," *Bradley* v. *Fisher*, 80 U.S. 646, 651 (1871), a judge is entitled to complete immunity to suit based upon his official acts. *Pierson* v. *Ray*, 386 U.S. 547 (1967). "An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler* v. *Pachtman*, 96 S.Ct. 984, 989 n.13 (1976). *Cf. Spires* v. *Bottorff*, 317 F.2d 273, 274-75 (7th Cir. 1963).

The allegedly wrongful acts committed by Judge Stump consisted solely in his approval of the petition filed in his court by defendant McFarlin. The circuit courts of Indiana are courts of general jurisdiction, having "original exclusive jurisdiction in all cases at law and in equity whatsoever." Ind. Code § 33-4-4-3 (Burns 1975). There is *jurisdiction* in such a court to hear petitions for tubal ligation, *cf. A.L.* v. *G.R.H.*, 325 N.E.2d 501 (Ind. App. 1975) (by implication), although the court there held that on the merits the sterilization could not be thus consented to. But whether or not Judge Stump's "approval" of the petition may in retrospect appear to have been premised on an erroneous view of the law, Judge Stump surely had jurisdiction to consider the petition and to act thereon. Accordingly, Judge Stump is clothed with absolute judicial immunity, and neither he nor his alleged coconspirators may be held liable under sections 1983, 1985 or under the Fourteenth Amendment.

(Footnote continued from preceding page.)
It is alleged that this statute unconstitutionally authorized the surgery performed here. However, the court order entered by Judge Stump did not rely on this provision; the statute does not authorize tubal ligations, *see* A. L. v. G.R.H., 325 N.E.2d 501 (Ind. App. 1975); and in any event such a statute, being declarative of the common law, will not provide the necessary state action for a Fourteenth Amendment violation. *Cf.* Phillips v. Money, 503 F.2d 990 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975); Gibbs v. Teitelman, 502 F.2d 1107 (3d Cir. 1974), *cert. denied*, 419 U.S. 1039 (1974).

Wade v. *Bethesda Hosp.*, 337 F. Supp. 671, 356 F. Supp. 380 (S.D. Ohio 1971, 1973) is not to the contrary. There, a probate judge acting under a specific statute conferring jurisdiction to order sterilizations was held to have no immunity, where the special statute conferring jurisdiction had been repealed at the time the judge ordered the sterilization to be performed. No such limited jurisdiction is in issue in this case.

Since it appears that plaintiffs have no constitutional claims which can be asserted against the defendants, defendants' motions to dismiss the first and fourth causes of action of plaintiffs' complaint will be granted.

Plaintiffs' remaining claims are for medical malpractice, assault and battery, and loss of potential fatherhood. It appears that these claims rest wholly on state law grounds, with jurisdiction said to lie under the pendent jurisdiction of the court. However, since all federal claims must be dismissed, there is no longer existing the necessary federal grounds for jurisdiction from which the state law claims may be said to be pendent. Accordingly, the remainder of plaintiffs' claims will be dismissed for lack of subject matter jurisdiction, Rule 12(b)(1), Fed. R. Civ. P. The dismissal of the state law claims is without prejudice to plaintiffs' rights under Indiana's Journey's Account Act, Ind. Code § 34-1-2-8 (Burns 1973); *see Eves* v. *Ford Motor Co.*, 281 N.E.2d 826 (Ind. App. 1972).

ORDER.

Accordingly, defendants' motions to dismiss are granted, and plaintiffs' first and fourth causes of action are hereby dismissed for failure to state a claim upon which relief can be granted; and the remaining claims are dismissed for lack of jurisdiction over the subject matter.

Entered this 13th day of May, 1976.

/s/ JAMES E. ESCHBACH
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 76-1706

LINDA KAY SPARKMAN and LEO SPARKMAN,
Plaintiffs-Appellants,

vs.

ORA E. MCFARLIN, WARREN G. SUNDAY, HAROLD D. STUMP, individually and as Judge of the Circuit Court of DeKalb County, Indiana, JOHN H. HINES, M.D., JOHN C. HARVEY, M.D., HARRY M. COVELL, M.D., and DEKALB MEMORIAL HOSPITAL, INC., a corporation,
Defendants-Appellees,

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

No. F 75-129-C—Jesse E. Eschbach, *Judge.*

ARGUED JANUARY 14, 1977—DECIDED MARCH 23, 1977

Before SWYGERT, WOOD, *Circuit Judges* and EAST, *Senior District Judge.**

SWYGERT, *Circuit Judge.* The question on appeal is whether a state court judge who ordered the sterilization of a fifteen-year-old girl is judicially immune from liability under the federal civil rights statutes. We hold that the judge acted extrajudicially and that the doctrine of judicial immunity is inapplicable to this case. The district court's judgment of dismissal of the complaint is reversed.

* Senior District Judge William G. East of the District of Oregon is sitting by designation.

I.

In 1971 defendant Ora E. McFarlin sought a court order to have her fifteen-year-old daughter Linda Sparkman, plaintiff, sterilized. Defendant Warren G. Sunday, an attorney, prepared the "Petition to Have Tubal Ligation Performed on a Minor and Indemnity Agreement." The petition contained an affidavit by McFarlin which stated that Linda was "somewhat retarded" although she attended public schools and had been "passed along with other children in her age level." McFarlin further alleged that, without her knowledge or consent, Linda had begun dating and staying overnight with older youths and men, and that she could not maintain a continuous observation over Linda to "prevent unfortunate circumstances." The petition was presented to defendant Judge Harold D. Stump of the Circuit Court of DeKalb County, Indiana, who issued the requested order in an ex parte proceeding. No guardian ad litem was appointed to represent Linda's interests and no hearing was held. Linda received no notice of the petition, and neither the petition nor the order was ever filed in the DeKalb County Circuit Court.

After Judge Stump had signed the order, Linda was taken to the DeKalb Memorial Hospital, and a tubal ligation was performed by defendant John H. Hines, M.D., Defendant Harry M. Covell, M.D., assisted in the operation and defendant John C. Harvey, M.D., was the anaesthesiologist. Linda was not informed of the true consequences of the surgery; in fact, she was told that the purpose of the hospital visit was to have her appendix removed.

In 1973 Linda married plaintiff Leo Sparkman. Two years later she learned for the first time (from Dr. Hines) that she had been sterilized. The couple brought an action seeking damages under 42 U. S. C. §§ 1983 and 1985(3), contending that the actions of the defendants in sterilizing her or causing her to be sterilized violated her constitutional rights. She attached pendent state claims for assault and battery and medical mal-

practice. Leo Sparkman asserted a pendent claim for loss of potential fatherhood.

The district court granted defendants' motions to dismiss the federal claims. It found that the only state action present, necessary to the federal claims, was the approval of the petition by Judge Stump. It then held that Judge Stump was "clothed with absolute judicial immunity" so that neither he nor any of the other defendants, alleged to be coconspirators, were liable under sections 1983, 1985(3) or the Fourteenth Amendment. The remaining state claims were dismissed for lack of subject matter jurisdiction as they were pendent to the federal causes of action.

II.

The doctrine of judicial immunity was adopted by the Supreme Court in *Bradley* v. *Fisher*, 80 U.S. 335 (1871), and was held applicable to actions brought under 42 U. S. C. § 1983 in *Pierson* v. *Ray*, 386 U.S. 547 (1967). Its purpose is to permit judges to exercise their judicial function independently, without fear of civil liability. It is available even where malicious or corrupt action on the part of a judge is alleged.

Judicial immunity is available, however, only where the judge has jurisdiction. *Bradley* v. *Fisher, supra; Pierson* v. *Ray, supra.* The jurisdiction required by *Bradley* is that over the subject-matter; that is, the power of a court to hear and decide a cause of action before it. Although immunity exists when jurisdiction is present even though the judge acts in excess of that jurisdiction, it is not available when he acts in "clear absence of all jurisdiction." *Bradley*, 80 U.S. at 351. Thus, the crucial issue here, upon which immunity turns, is whether Judge Stump acted within his jurisdiction when he approved the petition to have Linda Sparkman sterilized.

In approving the petition, Judge Stump cited no statutory or common law authority under which he was purporting to act.[1] Moreover, counsel has not during the course of this litigation cited any specific statutory or common law basis under which a court can order the sterilization of a child simply upon the petition of a parent.

Defendant Stump rests his argument that he had jurisdiction in this case on Indiana Code 33-4-4-3, which is a general grant of jurisdiction to the circuit courts.[2] It confers original jurisdiction "in all cases at law and in equity. . . ." Although this grant of juridical power is broad, we cannot accept the assertion that it cloaks an Indiana circuit judge with blanket immunity. He may not arbitrarily order or approve anything presented to him in the form of an affidavit or petition. A claim must be characterized as a case in law or equity in order to come within the statute. In short, it must have a statutory or common law basis.

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1. His order, dated the same day as the petition, reads:

   I, Harold D. Stump, Judge of the DeKalb Circuit Court, do hereby approve the above Petition by affidavit form on behalf of Ora Spitler McFarlin, to have Tubal Ligation performed upon her minor daughter, Linda Spitler, subject to said Ora Spitler McFarlin covenanting and agreeing to indemnify and keep indemnified Dr. John Hines and the DeKalb Memorial Hospital from any matters or causes of action arising therefrom.

2. Indiana Code 33-4-4-3 provides:

   Jurisdiction. Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever, and in criminal cases an action for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon Justices of the Peace. It shall also have exclusive jurisdiction of the settlement of decedent's estates and of guardianships: provided, however, that in counties in which Criminal or Superior Courts exist or may be organized, nothing in this section shall be construed to deprive such courts of the jurisdiction conferred upon them by laws, and it shall have such Appellate jurisdiction as may be conferred by law, and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer. [Acts 1881 (Special Session), Chapter 24, Section 3, page 102.]

We agree with plaintiffs, based on an independent examination of Indiana law, that there was no statutory authority for Judge Stump's actions. The statutory scheme in existence at the time in fact negated his right to assert any jurisdiction over the petition. In 1971 Indiana Code sections 16-13-13-1 through 16-13-13-4 were in effect.[3] These statutes authorized sterilization of institutionalized persons under certain circumstances. Those circumstances involve specific procedures to be followed, including the right to notice, opportunity to defend, and the right to appeal. This statutory scheme clearly negates jurisdiction to consider sterilization in cases not involving institutionalized persons and in which these procedures are not followed. *See Kemp* v. *Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); *Smith* v. *Command*, 231 Mich. 409, 204 N.W. 140, 146 (1925).

In addition, jurisdiction for a court to order sterilization cannot be found in the common law of Indiana. It is argued on behalf of the defendants that the Indiana Court of Appeals implied that such jurisdiction exists in *A.L.* v. *G.R.H.*, 325 N.E. 2d 501 (Ind. Ct. App. 1975). Aside from the fact that *A.L.* was decided after Judge Stump acted, it undercuts rather

3. Indiana Code 16-13-13-1 provides:

> Authorization. Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of insane, feebleminded or epileptic persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent, if a lawfully licensed physician and surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeblemindedness: Provided, That such superintendent shall have first complied with the requirements of this act [16-13-13-1–16-13-13-6.]

Section 16-13-13-2 sets out the procedures to be taken in such a case. Section 16-13-13-3 and section 16-13-13-4 provide for appeals.

than supports his position. The court in *A.L.* affirmed the trial court's denial of a declaratory judgment authorizing a parent to consent to the sterilization of a minor child. If the opinion implies anything, it is that no jurisdiction to order sterilizations exists. This view is supported by the fact that the cases cited by the *A.L.* court all held that, in the absence of express statutory authority, courts lack the power to order sterilizations.[4]

Moreover, the defendants can derive no comfort from the common law of other states. In general, courts have refused to order the extreme remedy of sterilization absent specific legislative authority, holding that it was not within their common law powers. *See Holmes* v. *Powers*, 439 S.W. 2d 579 (Ky. Ct. App. 1968); *Frazier* v. *Levi*, 440 S.W. 2d 393 (Tex. Ct. Civ. App. 1969); *In Interest of M.K.R.*, 515 S.W. 2d 467 (Mo. 1974); *Kemp* v. *Kemp*, *supra*.[5]

Given the fact that the purported judicial action of defendant Stump had no support in statute or previous common law, Judge Stump could only claim to be acting lawfully if the remedy of sterilization that he imposed was a valid exercise of

4. *Frazier* v. *Levi*, 440 S.W. 2d 393 (Tex. Ct. Civ. App. 1969); *Holmes* v. *Powers*, 439 S.W. 2d 579 (Ky. Ct. App. 1968); *In Interest of M.K.R.*, 515 S.W. 2d 467 (Mo. 1974); *Kemp* v. *Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).

5. In some of these cases the facts which might have warranted sterilization were quite compelling, which cannot be said of those in the instant case. For example, in *Frazier* v. *Levi*, *supra*, the subject was an adjudged incompetent woman, 34 years old with the mentality of a six-year-old. She was the ward of her parents, who were also supporting her two illegitimate children, both retarded. The parents claimed that they could not bear the economic burden of any more children. The court found it could not authorize sterilization absent statutory or constitutional authority.

The only recent case permitting such action by a court without specific statutory authority was *In re Simpson*, 180 N.E. 2d 206 (Ohio Prob. 1962). In that case, statutory authority was found by construing a section providing that when mental institutions were overcrowded, a probate judge could take such action as he deems necessary for the health and welfare of the feeble-minded. The validity of that decision is questionable, however, considering the subsequent decision in *Wade* v. *Bethesda Hospital*, 337 F. Supp. 671, 356 F. Supp. 380 (S.D. Ohio 1971, 1973).

the power of courts to fashion new common law.[6] We hold that it was not. Although courts ought not to be discouraged from creating innovative legal remedies to meet changing social conditions, they may not use the power to create new decisional law to order extreme and irreversible remedies such as sterilization in situations where the legislative branch of government has indicated that they are inappropriate. If we were to say that jurisdiction existed to order sterilization without adherence to the requirements of institutionalization and procedural due process mandated by the Indiana legislature, we would be sanctioning tyranny from the bench. There are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take.[7]

Even if defendant Stump had not been foreclosed under the Indiana statutory scheme from fashioning a new common law remedy in this case, we would still find his action to be an illegitimate exercise of his common law power because of his failure to comply with elementary principles of procedural due process. Here a juvenile was ordered sterilized without the taking of the slightest steps to ensure that her rights were protected. Not only was the plaintiff not given representation, she was not even told what was happening to her. She was afforded no opportunity to contest the validity of her mother's allegations or to have a higher court examine whether the substance of those allegations, even if true, warranted her sterilization. Finally, the petition and order were never filed in court. This kind of purported justice does not fall within the categories of cases at law or in equity.

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6. This claim was never asserted in defendants' briefs or at oral argument.

7. There are other examples of extreme and unauthorized remedies not distinguishable from the present case. If Judge Stump were said to be acting validly under the power of courts to create new common law, a judge of general jurisdiction could order, upon an affidavit and petition similar to the one in the instant case, that a United States citizen should be disenfranchised because he is "un-American." Clearly such a remedy would be beyond the judge's general jurisdiction.

Thus, Judge Stump's action had no basis either in law or in equity and was therefore taken without jurisdiction. In the absence of jurisdiction, a judge is not entitled to judicial immunity in a suit for damages that resulted from his action.

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with this opinion.